

# THE CORPORATION JOURNAL

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THE CORPORATION TRUST COMPANY AND ASSOCIATED COMPANIES

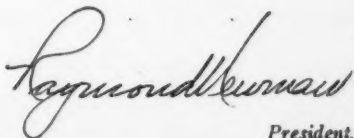
*In the incorporation, qualification and statutory representation of corporations, The Corporation Trust Company, C T Corporation System and associated companies deal with and act for lawyers exclusively.*

The Supreme Court of Delaware has held that a charter provision giving a special class of stock the right to negative the election of a director is unauthorized by law. (See page 246.)

The Secretary of State of Kansas was upheld by that state's Supreme Court in refusing to file a charter amendment providing for the use of other corporate names by a company as trade names. (See page 247.)

An appraisal of stock was granted by the New York Supreme Court to a stockholder where an exchange proposed involved the loss of the right to accrued unpaid dividends, the loss of the cumulative character of the dividends and a decreased rate of return. (See page 248.)

The inspection, in accordance with Arizona law, of an Arizona corporation's books kept in the State of Washington, has been allowed by the Supreme Court of Washington. (See page 256.)



President.

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"But when it comes to those fine-line decisions to be made in transferring on our books the title to a block of our company's stock, or deciding who is entitled to dividends on certain shares, or shouldering the responsibility of saying who has or hasn't authority to vote at a stockholders' meeting—I feel it isn't fair to expect our regular business employees to take on that burden. Too much specialized experience required, too concentrated attention—and too much dynamite in it."

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The Corporation Journal is published by The Corporation Trust Company, monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost (\$1.50).

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# THE CORPORATION TRUST COMPANY

## CT CORPORATION SYSTEM



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Having offices or representatives in every state and territory of the United States and every province of Canada and a large, trained organization at Washington, these companies:

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—under direction of attorneys furnish the statutory office or agent required for either domestic or foreign corporation in any jurisdiction;

—keep attorneys informed of all state taxes to be paid and reports to be filed by a client corporation in the state of incorporation and any states in which it may qualify as a foreign corporation.

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# What Constitutes Doing Business

## Subcontractors

Where a foreign corporation engages subcontractors to carry out the provisions of a contract the foreign corporation has agreed to perform in a state in which it is not licensed, the question arises as to whether the foreign corporation is required to be authorized to do business under such circumstances.

In a Michigan Federal court decision,<sup>1</sup> a Wisconsin company obtained a contract to equip a plant in Michigan with a system of automatic fire sprinklers. Subcontractors were employed to do the actual work, furnishing the labor, material and supervision required. In denying the foreign corporation recovery in the Federal court under the Michigan statutes, because it was an unlicensed foreign corporation, the court ruled that the contract, in its entirety, was a business transaction, local in its nature.<sup>2</sup>

There are two cases in which unlicensed foreign corporations, acting as subcontractors, were not regarded as doing business so as to be required to be authorized to do business. In one, the subcontractors were regarded as engaged

in an isolated transaction,<sup>3</sup> while in the other, the highly specialized nature of the material supplied and installed by the subcontractor was held not to require registration.<sup>4</sup>

Where the foreign corporation performs part of the contract in the state itself by engaging in intrastate business, there can be no question that it should be authorized to carry on such business. In a leading case pursued to the Supreme Court of the United States,<sup>5</sup> a foreign corporation agreed to erect a steel bridge in Arkansas and sublet all the work except the erection of the steel superstructure to a partnership. The corporation made shipments of steel parts from Missouri into Arkansas to itself and delivered them to the subcontractor. The court ruled that the company's delivery of these materials to the subcontractor comprised intrastate business separate from any interstate commerce and affirmed a judgment subjecting the corporation to a statutory fine because of its failure to be authorized to do business.

<sup>1</sup> *Phillips Co. v. Everett*, 252 Fed. 341. A Wisconsin Federal court case in which an unlicensed foreign corporation, acting as a subcontractor, was denied the right to sue the principal contractor under somewhat similar circumstances is *Loomis v. People's Const. Co.*, 211 Fed. 453.

<sup>2</sup> States, in addition to Michigan, in which unlicensed foreign corporations are, by statute, incapable of maintaining actions on contracts involving intrastate business are Alabama, Arizona, Arkansas, Idaho, Iowa, Mississippi, Missouri, New York, Oklahoma, South Dakota, Texas, Utah, Vermont, Wisconsin and Wyoming. Tennessee may be added to this group as a result of court decisions on that state. (*Peck Williamson Heating & Ventilating Co. v. McKnight & Mera*, 205 S. W. 419 and *In re Meyer & Judd*, 1 F. 2d 513.)

<sup>3</sup> *Richmond Screw Anchor Co. v. E. W. Minter Co., Inc.*, 156 Tenn. 19, 300 S. W. 574.

<sup>4</sup> *Williams v. Golden & Crick*, 247 Pa. 397, 93 Atl. 505.

<sup>5</sup> *Kansas City Structural Steel Co. v. State of Arkansas, For Use and Benefit of Ashley County*, (1925) 46 S. Ct. 59, 269 U. S. 148.

## Domestic Corporations

### Delaware.

Charter provision, giving special class of stock right to negative election of a director under certain circumstances, regarded as invalid. A Delaware corporation's charter, prior to a proposed amendment, provided for two classes of stock, Class A and common. These were identical with the single exception that the charter provided "that no person shall be elected a director of the Corporation against whom there shall be cast the votes of forty per cent (40%) in amount of the outstanding Class A stock." The amendment proposed would convert the Class A stock into common stock and thereby annul this peculiar power attached to the Class A stock. The Supreme Court of Delaware reached the conclusion that this provision was unauthorized by law and, after referring to Sections 13 and 30 of the General Corporation Law, containing provisions relating, respectively, to voting powers and the election of directors, said: "The clear inference to be drawn from the language of the statute is that the voting power attached to stock, as it relates to the election of directors, is an affirmative right to express a choice or preference, not merely the right of negation." *Aldridge v. Franco Wyoming Oil Co. et al.*, 14 A. 2d 380. Hastings, Stockly & Layton of Wilmington, for appellant. Ward & Gray of Wilmington (Clarence A. Southerland and E. Ennalls Berl of Wilmington and Alexander B. Siegel of New York City, of counsel), for appellees.

### Indiana.

Preferred dividends ordered paid where not declared because directors acted in bad faith. This action was brought by preferred stockholders against their corporation to recover dividends accrued on the preferred stock, the company having failed to pay dividends on that stock since January 1, 1935, although the earnings were alleged to be sufficient to warrant the payment of dividends. The Appellate Court of Indiana said that "the ultimate question for our decision is whether or not a court of equity in an action against the corporation may order dividends paid out of earnings on preferred stock certificates when the board of directors has failed and refused to declare such dividends and when said board of directors in doing so has 'acted in bad faith and oppressively.' It is our opinion that the question must be answered in the affirmative." The lower court's action in allowing interest upon the dividend accruals at the time they should have been paid, at the rate of 6 per cent per annum until paid, was approved. The lower court was ruled to be in error "in issuing a mandate to the defendant to declare and pay dividends in the future so long as it is possessed of surplus or earnings from which to pay such dividends. It is the duty of the directors of the corporation to declare and pay dividends to the stockholders out of the surplus earnings or net profits or surplus paid in in cash of the

corporation. Sec. 25-211, Burns Indiana Statutes, 1933 Revision. But this duty rests in the sound discretion of the directors and the corporation can be compelled to pay such dividends only upon a showing that the board of directors has abused its discretion in failing to declare them." *W. Q. O'Neill Co. v. O'Neill et al.*, 25 N. E. 656. Commerce Clearing House Court Decisions Requisition No. 235291. *W. J. Sprow of Crawfordsville and Matson, Ross, McCord & Clifford of Indianapolis*, for appellant. *Harding & Harding of Crawfordsville*, for appellees.

#### Kansas.

Refusal of filing of charter amendment upheld where it provided for use of other corporate names as trade names. The plaintiff Kansas company sought by mandamus to compel the defendant secretary of state to file a certificate of amendment of plaintiff's charter and to issue a certified copy thereof to be recorded in the office of the register of deeds. The amendment, which the secretary of state had refused to file, provided: "That this corporation shall have the power to conduct the affairs and business of the corporation under the trade names of: Marion Milling Company, Wichita, Kan.; Marion Milling Company, Marion, Ohio; St. Johns Mills, St. John, Kan.; The Lassen-Jackman Milling Company, Wichita, Kan.; Southern Milling Company, Wichita, Kan.; and Cereal Research Laboratories, and all such other trade names as the board of directors may, from time to time, determine." The Kansas Supreme Court, in denying the writ of mandamus, upheld the state official in his action, indicating, as to amendments, that "where it appears from the face thereof that required statements of fact and information are not included or where included make provision for the exercise of power contrary to express or implied provisions of law, then the secretary of state has the power and it is his duty to refuse to file the articles of incorporation or the amendment thereto, as the case may be." Concluding its opinion, the court said: "We are of the opinion that the general corporation code not having in it any permission for it so to do, a corporation may not, either in its articles of incorporation or by amendment thereto, obtain the right to conduct its business under a trade name or series of trade names in addition to its corporate name and title." *The Kansas Milling Company v. Ryan, Secretary of State*, 102 P. 2d 970. Commerce Clearing House Court Decisions Requisition No. 240427. *Robert C. Foulston, George Siefkin, Sidney L. Foulston, Lester L. Morris, George B. Powers, Carl T. Smith, C. H. Morris and John F. Eberhardt of Wichita*, for plaintiff. *Jay S. Parker, Atty. General, and A. B. Mitchell, Asst. Atty. General*, for defendant.

#### New York.

In reviewing action involving dissenting stockholders' right of appraisal where there was a proposed sale of bulk of corporation's

property, Appellate Division directs appraisers to estimate the value of the stock as of the date plan was declared operative. In *Geiler v. Brooklyn-Manhattan Transit Corporation*, 18 N. Y. S. 2d 788, (The Corporation Journal, October, 1940, page 225), the New York Supreme Court, Special Term, Kings County, viewed the right of appraisal of dissenting stockholders as accruing immediately after the proposed sale of the bulk of a corporation's property is authorized under Secs. 20 and 21 of the Stock Corporation Law. Upon appeal, the Appellate Division, Second Department, while affirming the order of the Special Term, modified it by directing the appraisers to estimate the value of the petitioners' stock as of the date the plan was declared operative. *Application of Thomas et al.; Application of Ellenwood; Application of Geiler*, 259 App. Div. 736. Subsequently, on April 15, 1940, the Appellate Division, Second Department, denied motion for reargument in these consolidated proceedings, as reported at 259 App. Div. 833, 19 N. Y. S. 2d 656. Still later, on April 17, 1940, the same court, on its own motion, amended its decision as noted at 259 App. Div. 736, to conform with the subsequent development that the transit commission had declared the plan operative. *Application of Thomas et al.; Application of Ellenwood; Application of Geiler*, 259 App. Div. 843.

Appraisal of stock granted where exchange involved loss of right to accrued unpaid dividends, loss of cumulative character of dividends and decreased rate of return. Petitioner, seeking the appointment of appraisers to value his stock under Secs. 21 and 38(9) of the Stock Corporation Law, owned 1,320 shares of the preferred stock of respondent corporation at a time when a certificate was filed with the Secretary of State authorizing the issue of prior preferred stock which was to supplant, replace and retire the outstanding preferred stock which petitioner and others held. Petitioner's preferred stock was entitled to receive when and as declared dividends at the rate of \$2 per share a year, which were cumulative. The dividends on the new preferred stock were not cumulative and were at the rate of \$1 instead of \$2. The Supreme Court, Erie County, in granting a motion in favor of appointing appraisers, observed: "If petitioner should surrender his preferred shares in exchange for new preferred shares, there is no question but that his preferential rights would be altered. His right to accrued unpaid dividends would disappear; his rate of return would be cut from \$2 per share to \$1; his dividend rights would be divested of their cumulative character. On the other hand, should the petitioner retain his preferred shares as he has, there would also have been effected an alteration in his preferential rights." *In re Gohn*, 20 N. Y. S. 2d 254. Samuel C. Battaglia of Buffalo, for petitioner. Harter & Schork of Buffalo, for respondent.

Property held by liquidating directors held not subject to levy under execution on judgment recovered against company after dissolution. "The question," said the Supreme Court, Special Term, New York County, "is, whether, after a domestic corporation has

been dissolved by unanimous consent of the stockholders pursuant to Section 105 of the Stock Corporation Law, its property in the hands of its liquidating directors is subject to levy and sale under an execution on a judgment recovered against the corporation after its dissolution for goods sold and delivered prior to the dissolution. Defendants contend that Section 105 of the Stock Corporation Law contemplates a dissolution by a solvent corporation only. An examination of the statute, however, fails to indicate any language to support this contention. On dissolution of the corporation the legal title to its property was vested in the directors as trustees for creditors and stockholders. The purpose of the statute was to provide for a pro rata distribution of the corporation's property to creditors and to prevent any one creditor from securing a preference over any other. Under the circumstances, there was no property of the corporation which was subject to levy or sale under the execution issued herein." *Steinhardt Import Corporation et al. v. Levy, City Marshal et al.*, 20 N. Y. S. 2d 360. Otto A. Samuels of New York City, for plaintiffs. Monroe Schiffman of New York City, for defendants.

Substituted service order vacated by city court where defendant corporation's principal office was in county in which court was located and service could be had on defendant's agent, the Secretary of State. The City Court of New York, New York County, granted a motion to vacate an order for substituted service of summons upon the defendant domestic corporation, obtained under Sec. 230 of the Civil Practice Act, where it appeared that the corporation had its principal place of business within the City and County of New York and that there was an absence of proof that the plaintiff could not serve the Secretary of State, the defendant's agent for the service of process. The court said: "If the office of the defendant corporation is in the county in which the court is located, service upon the Secretary of State will confer jurisdiction upon a court of limited jurisdiction." *Midvale Paper Board Co., Inc. v. Cup Craft Paper Corporation*, 19 N. Y. S. 2d 135. Black, Varian & Simon of New York City, opposed. Schlesinger & Krinsky of New York City, for the motion.

Change of shares of one class into shares of another class, following readjustment of capital stock, held not to constitute a "reclassification." Plaintiff stockholders, in an action which was not a representative action, sought to nullify a readjustment of the capital structure of the defendant corporation. At a time in 1935 when the corporation was authorized to issue 80,000 shares of common stock without par value and 30,000 shares of convertible participating preferred stock without par value, a plan was proposed, and later adopted by vote of more than two-thirds of each class of stock, under which the capital stock was to be reduced from 110,000 shares to 80,000 shares, all common stock without par value. Each share of preferred stock was to be exchanged for one and one-half shares of new common stock, each share of common stock was to be exchanged

for one share of new common stock, and accumulated dividends and sinking fund arrears were to be eliminated. Following the stockholders' action, the certificate required by Section 36 of the Stock Corporation Law was filed on December 2, 1935. A question raised concerned whether the change effected constituted a "reclassification" of the corporation's capital stock, for, under a 1927 amendment to the company's charter, at least thirty days' notice of a reclassification of the capital stock was required to be given. The stockholders in this instance had received only two weeks' notice of the meeting at which action had been taken. The Supreme Court, Special Term, New York County, said: "The Stock Corporation Law does not define 'reclassification.' The word occurs only in connection with the stock changes provided for in Section 36. 'Classification' is ordinarily defined as a grouping into classes. 'Reclassification' is a regrouping. As used in paragraph (10) of the amendment of 1927 or in the stock certificate issued thereunder, the word can only be given the meaning assigned to it by the statute, and that meaning does not include such a change of shares as was effected by the defendant in 1935. Since that change did not amount to a reclassification the notice provided for by paragraph (10) was not a prerequisite to the meeting called to effect the change. The only notice required was the statutory notice of from 10 to 40 days prescribed by Section 45 of the Stock Corporation Law. That notice was concededly given." Judgment was directed for the corporation. *Davison et al. v. Parke Austin & Lipscomb, Inc. et al.*, 19 N. Y. S. 2d 117. Charles Stewart Davison and Frank C. Mebane, Jr., of New York City, for plaintiffs. Brodek & Eisner, of New York City, for defendants.

#### Oklahoma.

**Corporation, after expiration of charter, held empowered to renew corporate existence by majority consent.** Two months after the twenty-year period of existence of an Oklahoma corporation had expired, an amendment to the articles of incorporation was filed in the office of the Secretary of State, signed by more than 75% of the owners of the corporate stock, indicating a desire to revive the charter and extend the corporate existence for twenty years from the date of expiration. This action was brought by stockholders to effect the dissolution of the company, obtain the appointment of a receiver, and for an accounting. Affirming an order denying the appointment of a receiver, the Supreme Court of Oklahoma expressed its rulings in its syllabus as follows: "1. Sections 9713 and 9790, O. S. 1931, 18 Okla. St. Ann. §§ 1, 165, permit the revival or renewal of the corporate existence of a domestic corporation after the expiration of the term specified in its original charter, where it has been at all times operated as a going concern and no steps toward winding up its affairs have been taken prior to the revival or renewal of its corporate existence. 2. In the absence of any requirement in the statutes governing the revival or renewal of the corporate existence, or of any provision therefor in the by-laws of the corporation, the

unanimous consent of the stockholders is not essential to such renewal or revival, but the consent of a majority is sufficient." *Loeffler et al. v. Federal Supply Co. et al.*, 102 P. 2d 862. Abernathy & Howell of Shawnee, for plaintiffs in error. Shirk, Paul, Earnheart & Shirk of Oklahoma City, for defendants in error.

### Pennsylvania.

Inspection of books allowed where sought for purpose of soliciting proxies; by-law amendment held invalid where adopted without proper notice to stockholders. In *Klein et al. v. Scranton Life Ins. Co. et al.*, 11 A. 2d 770, the Supreme Court of Pennsylvania had before it litigation involving an attempt by stockholders to inspect corporate books, following a refusal by the officers to permit examination by the plaintiffs, who also sought to copy a list of the shareholders in order to solicit proxies for voting at the annual meeting of the shareholders. The court, finding there was no evidence to sustain a finding that the examination of the books was sought for speculative purposes, indicated that "it is not necessary for a stockholder to aver mismanagement or fraud to obtain his right to inspect corporate records." It was ruled that it was "settled beyond question" in Pennsylvania that "the purpose of ascertaining whether the business of the corporation has been properly conducted, and for the purpose of soliciting proxies for use at the shareholders' meeting, is sufficient to justify an examination of the defendant corporation's books of account." Examination of the books of the company, "without due interference with the operation of its business," was therefore allowed. Finding that the by-laws of the corporation had been amended at a stockholders' meeting, of which proper notice had not been given to the stockholders, the court ruled the amendment was illegally adopted and therefore void and also concluded that directors elected under the invalid amendment had been illegally elected. *Klein et al. v. Scranton Life Ins. Co. et al.*, 11 A. 2d 770. Alfred M. Klein of Philadelphia and Vosburg & Vosburg of Scranton, for appellants. William J. Fitzgerald and Kelly, Fitzgerald & Kelly of Scranton, for appellees.

### Virginia.

Accrued and unpaid cumulative preferred dividends ruled not payable upon liquidation where charter included no specific provision for such payment. The plaintiff was the holder of 122 shares of first preferred and 66 shares of second preferred stock of defendant company, on which there was a considerable amount due for accumulated and unpaid dividends, when a plan of reorganization was submitted by letter to him and the other stockholders. The letter contained the statement that no provision would be made for the payment of the accumulated unpaid dividends on the preferred stock. Plaintiff instituted this action asking for a declaratory judgment determining his rights and the extent of his participation in the

*A certified copy to file, an entrance  
fee to pay-- company qualified! . . .  
An annual report to file, a franchise  
tax to pay-- company OK for an-  
other year! . . .*

*... That was about all there was to it, in-  
client extended its business*

**No wonder lawyers prize the Corporation  
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observation of all requirements to one thing**

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... old days, when a lawyer's  
... an outside state. But nowadays! . . .  
... ess

What a vast network of requirements, differing in different states! The publication—of intention to file in some states, or of the charter in others, or of a "synopsis" of the charter in still others . . . filing—of extra certified copies in county offices in some states, of special certificates of one kind or another in others . . . anti-trust affidavit required here, occupation license there . . . furnishing date in some states on which company commenced business in the state, in others the names and addresses of stockholders! With the dozens of such differing requirements in different

states, what a job this qualification of a company may in these days become! . . .

And after qualification . . . an occupation license tax in one state and an income tax in another, a use tax here and a corporate excess tax there . . . sales taxes, intangible property taxes, "business" taxes . . . an annual capital stock return, or an annual "foreign bonus report," or a report of change in stated capital and surplus, or an annual report of dividends paid to residents, or a registry statement, or an annual certificate of condition . . .

... orchest system, which procures for them from official sources the  
... completing details . . . and after qualification reduces the  
... this time and that thing simple!

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capital assets of defendant company in case of its liquidation, in order that he might be in a position to act intelligently upon the proposal for the reorganization. The charter of defendant company, as amended, provided that in the case of the retirement of the preferred stock, the company was required to pay both a premium on the par value of the stock and "accumulated dividends" thereon, but in the case of liquidation there was no mention of accumulated dividends, although the provision was made that the preferred stock was to be preferred as to assets. The Supreme Court of Appeals of Virginia observed: "Certainly the use of the words 'accumulated dividends' in one instance and the failure to use them in the other were not intended to convey the same meaning. On the contrary we think it shows a deliberate intent on the part of the draftsman, in the event of the liquidation of the company, to confine the preference to the principal of the stockholder's investment, that is, the value of his preferred stock without such accrued dividends." *Powell v. Craddock-Terry Co.*, 7 S. E. 2d 143. Meade & Talbott of Danville, for plaintiff in error. Malcom K. Harris of Danville and Kemp, Hobbs, Daniel & Davidson of Lynchburg, for defendants in error.

#### Washington.

Corporation, stricken from records for non-payment of license fees, ruled subject to suit during the ten subsequent years in which it could be reinstated. A Washington corporation, the defendant, had been noted by the Secretary of State as stricken from his records on July 1, 1935, for non-payment of its license fees. A 1937 act gave to such a corporation "the privilege of becoming reinstated and having its corporate license restored by applying to the secretary of state for such reinstatement at any time within ten (10) years after such corporation may have been or may be stricken or dissolved." A question raised concerned the validity of a judgment entered against the corporation August 14, 1937. The Washington Supreme Court ruled that the judgment was valid, quoting from a prior decision as follows: "So long as a corporation may reinstate itself, it is not dead, and is, therefore, subject to process and suit." *National Grocery Company v. Kotzebue Fur & Trading Company*, Washington Supreme Court, March 25, 1940. Commerce Clearing House Court Decisions Requisition No. 235187.

## Foreign Corporations

#### California.

Court held authorized to enjoin illegal assessment on stock by foreign corporation active only in California, but not to enjoin future assessments. In an action brought to enjoin the levy of an assessment upon corporate stock of defendant corporation, an Arizona company conducting all of its business in California, the District

Court of Appeal, Third District, ruled that the lower court could properly assume jurisdiction over this foreign corporation to the extent of determining that a meeting at which an assessment had been levied had not been legally held and that penalties provided for failure to pay the assessment could be enjoined. The court emphasized, however, that there was nothing in the pleadings which would justify enjoining the defendant company from levying and collecting any future assessments. *Sharp et al. v. Big Jim Mines et al.*, 103 P. 2d 430. Commerce Clearing House Court Decisions Requisition No. 240170. Emmett A. Tompkins of Los Angeles, for appellants. Laurence W. Beilenson, Paul E. Iverson and Loeb, Walker & Loeb of Los Angeles, for respondents.

### Maryland.

**Statutory requirement of registration of foreign corporation engaged in interstate commerce ruled invalid.** The complainant corporation was engaged in the business of foreign trade as an importer. Coffee imported was stored in a warehouse in Baltimore in unbroken packages and sold through defendant, a Maryland broker, upon orders accepted by complainant in New York, where payment was also made. The Circuit Court of Baltimore City ruled that the company was engaged in interstate commerce under the circumstances. The court also held that Sections 120 and 121 of Article 23 (Chapter 504 of Acts of 1937), requiring the registration of foreign corporations engaged in interstate or foreign commerce and the appointment of a resident agent by such companies and providing penalties, were in violation of the commerce clause of the Federal Constitution, as applied to such companies. The registration of companies engaged in intrastate business provided in the same statute was, however, regarded by the court as entirely constitutional. *Steinwender, Stoffregen & Co., Inc. v. Ritchey et al.*,\* Circuit Court of Baltimore City, September 13, 1940. Commerce Clearing House Court Decisions Requisition No. 243833. R. Ellsworth Jones and Henry Zoller, Jr., for complainant. Daniel B. Chambers, Jr., for respondent. (*We are informed that an appeal is not unlikely.*)

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\* The full text of this opinion is printed in **The Corporation Tax Service**, Maryland, page 305.

### Pennsylvania.

**Service of process upheld in Federal court where privilege of limiting venue under Section 51 of Judicial Code was lost through defendant's failure to assert it seasonably.** Plaintiff, an Indiana corporation, instituted suit against two affiliated Delaware corporations in a Federal court in Pennsylvania. One of the defendants was a wholly owned subsidiary of the other. The parent company sought to have service set aside on the ground that service against it had been made upon an officer or agent of its wholly owned subsidiary. The United States District Court, Western District of Pennsylvania,

indicated that while upon such a showing, a motion to quash service should be sustained, the service should be upheld as valid service where it was also shown that the same officer or agent of the subsidiary also acted as representative of the parent company, which maintained an office in Pittsburgh with its name on the door, and the name of the person upon whom service was made shown there as its representative. The parent company's name was also listed in the telephone directory. A second motion to quash the service was made two months after service had been effected. The court ruled that the motion was made too late, inasmuch as the Rules of Civil Procedure require such a motion to be made within twenty days after the service of the summons and complaint. In this motion, the parent company called attention to its incorporation in Delaware and to the fact that the plaintiff was incorporated in Indiana and referred to that portion of the Federal Statute of Venue, Sec. 51 of the Judicial Code, providing that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The corporation then sought to be dismissed as a party defendant inasmuch as the suit was brought in neither the residence of the plaintiff or the defendant. This the court refused, basing its refusal upon the fact that the dismissal was sought five months after the action was brought, during which depositions had been taken in Ohio at considerable expense to the parties and other progress made in the suit. The court ruled that the defendant had "lost the personal privilege of venue in the District in which it resides. This loss was caused by failure to assert it seasonably and by submission through conduct." *Fort Wayne Corrugated Paper Company v. Anchor Hocking Glass Corporation et al.*,\* United States District Court, Western District of Pennsylvania, January 24, 1940, Commerce Clearing House Court Decisions Requisition No. 229972. Patterson, Crawford, Arensburg & Dunn of Pittsburgh, for plaintiff. Reed, Smith, Shaw & McClay of Pittsburgh, for defendant.

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\* The full text of this opinion is printed in *The Corporation Tax Service*, Pennsylvania, page 312.

### Washington.

Inspection, in accordance with Arizona law, of Arizona corporation's books kept in Washington, allowed. The Supreme Court of Washington, upon a stipulation of the pertinent Arizona law regulating the inspection of the corporate books and records of Arizona corporations, affirmed a judgment in a mandamus proceeding in favor of the corporation's stockholders for the inspection of the corporate books and records maintained in Washington. *State ex rel. Grismer et al. v. Merger Mines Corporation et al.*, 101 P. 2d 308. James A. Wayne of Wallace, Idaho, and Hamblen, Gilbert & Brooke of Spokane, for appellants. H. J. Hull of Wallace, Idaho, and Graves, Kizer & Graves of Spokane, for respondents.

## Taxation

### Delaware.

New York franchise taxes and license fee of Delaware company treated as general unpreferred debts in absence of proof of New York law establishing them as preferred claims. In an action in which claims were presented to the receiver of a Delaware corporation, the charter of which had become void for failure to pay Delaware franchise taxes, the State of New York filed proofs of claim for franchise taxes and license fees. The Vice-Chancellor noted that unpaid Delaware franchise taxes were, by statute, given a preference, and also that the amount available was insufficient to satisfy the claim of the State of Delaware for such taxes. The claim of preference of New York for its taxes was disallowed, and those taxes treated as general unpreferred debts of the corporation, principally because no proof of the relevant law of New York, indicating that a preference was given there to taxes of that state, had been proffered by New York. *Silverman v. National Assets Corporation*, 12 A. 2d 389. Commerce Clearing House Court Decisions Requisition No. 233671. Ayres J. Stockly of Hastings, Stockly & Layton of Wilmington, for Leonard G. Hagner, Receiver.

### Missouri.

Foreign corporation, engaged exclusively in interstate commerce, ruled not subject to state franchise tax. Adopting a Commissioner's opinion, the Supreme Court of Missouri has held that a foreign corporation, although licensed to do business in Missouri, was not subject to the payment of the Missouri franchise tax where the company was engaged exclusively in interstate commerce with respect to Missouri in the transportation of crude petroleum through the state in a continuous movement from other states to states other than Missouri. *State v. Shell Pipe Line Corporation*,\* 139 S. W. 2d 510. Thompson, Mitchell, Thompson & Young, Robert Neill, Jr., and C. P. Berry, of St. Louis, for appellant. Roy McKittrick, Atty. Gen., and Max Wasserman, Asst. Atty. Gen., (Harry G. Waltner, Jr., Asst. Atty. Gen., of counsel), for respondent.

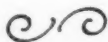
\* The full text of this opinion is printed in *The Corporation Tax Service*, Missouri, page 804.

### West Virginia.

Where gross income tax law contained no provision for apportionment, court holds tax could not be assessed upon income derived from deliveries and fabrication effected in another state. In *James v. Dravo Contracting Co.*, 58 S. Ct. 208, 302 U. S. 134, (The Corporation Journal, February, 1938, page 111), the Supreme Court of the United States upheld the West Virginia gross income tax as applied to the gross income of a contractor derived from activities within the state.

In remanding the action to the United States District Court for further proceedings, it was pointed out that West Virginia had no jurisdiction to lay a tax upon a company with respect to material and equipment fabricated in Pennsylvania and that, as to its installation in West Virginia, "an apportionment would in any event be necessary to limit the tax accordingly." The District Court entered a decree apportioning gross income for the purposes of taxation under the West Virginia gross income tax law in accordance with the cost of work performed in the respective states. Both the company and the tax commissioner appealed to the United States Circuit Court of Appeals, Fourth Circuit. The commissioner contended that the tax should be assessed upon the entire amount of the payments received by the taxpayer on the government contracts, less the amount paid upon delivery or fabrication of materials in Pennsylvania, title to which passed to the government upon such payments, while the taxpayer contended that the entire tax is void because no method of apportionment has been provided by statute. "We agree with the taxpayer," said the Circuit Court of Appeals, "that the court was without power to apportion its income on the basis of the cost of the activities involved in earning the income within and without the state. No such basis of apportionment is prescribed by statute; and, in the absence of statute, the court is without power to adopt it, as this is a legislative function involved in the imposition of the tax, and, therefore, not one which courts may exercise." "Since no method of apportionment is provided by the statute, it is clear that the apportionment directed by the Supreme Court means a separation, for purposes of taxation under the statute, of the portion of the income subject to the taxing power of the state." The cause was remanded to the District Court under a decree enjoining the collection of so much of the taxes as were assessed upon the portion of the income derived from payments made upon deliveries or fabrication at the Pennsylvania plant. *Dravo Contracting Co. v. James*,\* United States Circuit Court of Appeals, Fourth Circuit, September 6, 1940. Commerce Clearing House Court Decisions Requisition No. 243503; 114 F. 2d 242. Lawrence D. Blair of Pittsburgh, Pa., and W. Chapman Revercomb of Charleston, W. Va., (William S. Moorehead of Pittsburgh, Pa., and W. Elliott Nefflen of Charleston, W. Va., on brief), for appellant and cross-appellee. Clarence W. Meadows, Attorney General of West Virginia (W. Holt Wooddell, Assistant Attorney General of West Virginia, on brief), for appellee and cross-appellant.

\* The full text of this opinion is printed in **The Corporation Tax Service**, West Virginia, page 6247.



## Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.\*

IOWA. Docket No. 255. *Sears, Roebuck & Co. v. Roddewig et al.*, 292 N. W. 130. (The Corporation Journal, October, 1940, page 232.) Iowa use tax—collection of tax on mail orders filled by plaintiff's stores in other states. **Appeal filed, June 18, 1940. Certiorari granted, October 14, 1940.**

IOWA. Docket No. 256. *Montgomery Ward & Co. v. Roddewig et al.*, 292 N. W. 142. (The Corporation Journal, October, 1940, page 233.) Iowa use tax—collection of tax on purchases by Iowa residents in plaintiff's stores in other states. **Appeal filed, June 18, 1940. Certiorari granted, October 14, 1940.**

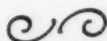
MINNESOTA. Docket No. 500. (October, 1939 Term.) *State of Minnesota v. National Tea Co. et al.*, 286 N. W. 360; affirming decision of District Court, Second Judicial District, Ramsey County, Minnesota, in *Hahn Department Stores, Inc. v. State of Minnesota*, (The Corporation Journal, January, 1938, page 86.) Constitutionality of prior Minnesota chain store tax imposed by Laws 1933, Ch. 213. **Appeal filed, November 3, 1939. Certiorari granted, December 11, 1939. Argued, March 7, 1940. Judgment of the Supreme Court of Minnesota vacated and cause remanded to that court for further proceedings, March 25, 1940. (Note: The judgment of the Minnesota Supreme Court, which was vacated by the Supreme Court of the United States, was reinstated by the Minnesota Supreme Court on September 27, 1940.)**

NORTH CAROLINA. Docket No. 61. *Best & Co. Inc. v. Maxwell, Commissioner of Revenue*, 3 S. E. 2d 292; petition for rehearing dismissed in part and sustained in part, 6 S. E. 2d 893. (The Corporation Journal, November, 1939, page 41.) Constitutionality of North Carolina occupation tax on privilege of taking orders at display room in state on goods to be shipped in interstate commerce. **Appeal filed, April 30, 1940. Probable jurisdiction noted, June 3, 1940.**

OHIO. Docket No. 97. *Voeller et al. v. The Neilston Warehouse Company et al.*, 26 N. E. 2d 442. (The Corporation Journal, October, 1940, page 226.) Sale of corporate assets—Ohio statute defining rights of dissenting stockholders. **Appeal filed, May 23, 1940. Certiorari granted, October 14, 1940.**

WISCONSIN. Docket No. 46. *J. C. Penney Co. v. Wisconsin Tax Commission*, 289 N. W. 677. (The Corporation Journal, March, 1940, page 135.) Constitutionality of Wisconsin Privilege Dividend Tax. **Appeal filed, April 10, 1940. Certiorari granted, May 20, 1940.**

\* Data compiled from CCH U. S. Supreme Court Service, 1940-1941.



## Regulations and Rulings

Since the *Berwind-White* decision by the Supreme Court of the United States in January, 1940, administrative officials of eleven states which impose sales taxes have, by regulation, applied the rule laid down in that case, which was to the effect that a sales tax could be applied to sales effected by contracts negotiated within the taxing jurisdiction where followed by shipment of goods from another state and delivery within the taxing jurisdiction. (*McGoldrick v. Berwind-White Coal Mining Co.*, 60 S. Ct. 388; The Corporation Journal, March, 1940, page 135.) These states are: Arkansas, Illinois, Iowa, Kansas, Michigan, Missouri, Oklahoma, South Dakota, Utah, Virginia and Washington.

**ARIZONA**—When a segregation of service and material charges is properly made, the sales tax is to be imposed only upon the material and not upon the service, according to an opinion recently rendered by the Attorney General to the State Tax Commission. (Arizona CT (Corporation Tax) Service, ¶ 7963.)

**GEORGIA**—Where a corporation, incorporated under the laws of Georgia, other than a non-profit or domesticated foreign corporation, ceases to do business but fails to dissolve as a corporation, it is required to pay the annual license or occupation tax. (Opinion of Attorney General to State Revenue Commissioner, Georgia CT, ¶ 4-003.)

**INDIANA**—The Indiana Gross Income Tax Regulations have been recently revised by the Gross Income Tax Division. (Indiana CT, ¶ 10-021.)

**IOWA**—The Attorney General has rendered an opinion to the effect that a truck which is to be used exclusively in interstate commerce is not subject to the Iowa use tax. (Iowa CT, ¶ 64-507.)

**KENTUCKY**—In an opinion to the Secretary of State, the Attorney General has ruled that the R. F. C. Mortgage Company, a Federal agency, is required to qualify and pay a filing fee. (Kentucky CT, ¶ 405) A wholesale grocery company operating several stores in Kentucky and selling feed by retail to farmers is subject to the chain store tax. (Opinion, Attorney General, Kentucky CT, ¶ 41-816.)

**MICHIGAN**—Foreign corporations, which are trading corporations and engaged in interstate commerce with no branches located in the State, are not required to file articles of association in Michigan and procure authority to transact business therein. (Opinion of Attorney General, Michigan CT, ¶ 401.)

**NEW YORK**—Vendors registered under the Sales Tax Law are not required to obtain a new registration under the Compensating Use Tax requirements. (Ruling of Special Deputy Comptroller, New York CT, ¶ 140-601.10.)

**WISCONSIN**—The Attorney General has expressed the view that a proposed article, providing that the directors of a corporation shall consist of not less than a minimum (to be stated) nor more than a maximum (to be stated), does not conform in the requirements of Section 180.02(1)(e) of the statutes. (Wisconsin CT, ¶ 414.)

## Some Important Matters for November and December

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

ALASKA—Annual Corporation Tax due on or before January 1.—  
Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January.  
—Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and  
January 20.—Domestic Corporations.

GEORGIA—Annual License Tax Report and Tax due on or before January 1.—Domestic and Foreign Corporations.

NEW YORK—Second Installment of Franchise (Income) Tax of Business Corporations due on or before November 15 (or within 30 days after notice, if given later than October 15; payable not later than January 15, in any event).—Domestic and Foreign Business Corporations other than real estate and holding companies.

Supplementary Franchise Tax Return (Form 60 CT) due on or before November 30.—Domestic and Foreign Corporations organized or qualified between May 15 and November 1 of current year.

UNITED STATES—Fourth Installment of Income Tax imposed for the calendar year 1939 due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.



# The Corporation Trust Company's Supplementary Literature

*In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York, N. Y.*

**Spot Stocks—and Interstate Commerce.** Treats, in a general and informal way, of the relation between the carrying of goods in warehouses in outside states and the statutory obligations which that activity, in some states, places on the corporation owning the goods.

**What Constitutes Doing Business.** (Revised to March 15, 1939.) A 184-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.

**When a Corporation Leaves Home.** A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

**We've Always Got Along This Way.** This is a 24-page pamphlet giving brief digests of cases in various states in which corporation officials who had thought they were getting along very well with statutory representation by a business employe suddenly found themselves penalized in unusual and often embarrassing ways: such as one company that had to pay its employe-representative's alimony.

**What! We Need a Transfer Agent? Nonsense!** The foregoing is the title of a pamphlet which describes in detail, with many illustrations, the exact steps through which a stock certificate goes in being transferred from one owner to another by an experienced transfer agent—purpose being to enable any corporation official to judge more accurately whether or not his own company should use the services of a transfer agent.

**Judgment by Default.** Gives the gist of Michigan Supreme Court case of *Rarden v. Baker* and similar cases in other states, showing how corporations qualified as foreign in any states and utilizing their business employes as statutory representatives are sometimes left defenseless in personal damage and other suits.

**A Corporation's Achilles Heel.** Containing the complete text of the opinion of the Supreme Court of the United States in *State of Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, State of Washington*, of the Supreme Court of New Mexico in *Silva v. Crombie & Co.*, and of the Supreme Court of Michigan in *Rarden v. R. D. Baker Co.*—three decisions of great significance to attorneys of corporations qualified in one or more states.

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